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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 787

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, ETC., PETITIONER

*v.*

FEDERAL RESERVE BANK OF SAN FRANCISCO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California (Pet. App. 7) is not reported. The opinion of the court of appeals (Pet. App. 1) is reported at 349 F. 2d 565.

### JURISDICTION

The judgment of the court of appeals was entered on August 3, 1965 (Pet. App. 1). On October 26, 1965, Mr. Justice Douglas extended the time in which to petition for a writ of certiorari to and including December 1, 1965. The petition was filed on December 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Treasurer of the United States is entitled to a reasonable time in which to complete a "first examination" of government checks presented to him for payment.

2. Whether the Treasurer in this case timely refused payment upon his "first examination."

## REGULATIONS INVOLVED

The pertinent provisions of Treasury Department Circular No. 176 (31 C.F.R. § 202.25), and Federal Reserve Board Regulation J (12 C.F.R. § 210), are reproduced in the Appendix, *infra*, pp. 13–17.

## STATEMENT

In March, 1961, Carl Witten tendered three checks to different branches of petitioner, the Bank of America, each in face amounts exceeding $8,000.00. The checks were purportedly drawn to Witten's order on the Treasurer of the United States. Notwithstanding that Witten was an entirely new customer with whom it had neither previous acquaintance nor prior dealings, petitioner's branch offices immediately paid out $14,500.00 to Witten in cash and opened savings accounts in his name for the remainder. Petitioner forwarded the checks to the Treasurer for payment via respondent Federal Reserve Bank's Los Angeles office. The Treasurer refused to pay the checks on the ground that the signature of the drawer, a Marine Corps disbursing officer, was a forgery. Respondent, which had initially credited petitioner's account with the sum in question, withdrew that credit.

Petitioner then commenced this suit against respondent to recover $14,500.00 on the ground that the Treasurer's refusal to pay was untimely. After a trial, the district court rendered judgment for respondent and the court of appeals affirmed (Pet. App. 1). Since the case closely concerns the procedures by which the government pays checks drawn on the Treasury, we describe those procedures in some detail.

1. *Regulations governing the payment of government checks:* (a) *The Treasurer's Procedures.* While banks may present government checks directly to the Treasurer in Washington for payment, Treasury regulations also allow immediate credit for such items, when forwarded via the Federal Reserve Banks which are authorized to act as clearing houses (12 U.S.C. 248(o); 12 C.F.R. § 210.2(a)). The Treasurer maintains accounts in the several Reserve Banks. Under Treasury Department Circular No. 176 (31 C.F.R. § 202.25(a)–(e), Appendix, *infra*, pp. 13–15), each of these banks may cash a government check upon receipt by debiting the Treasurer's account in the check's face amount and giving credit to the account of the forwarding bank.[1] This credit, however, is conditional. The Treasurer has expressly reserved the right to refuse payment of a government check if upon his "first examination" of it he discovers that the check has been altered in amount or that the signature of the drawer has been forged (31 C.F.R. 202.25(d), (e)(1)(i) and (ii), Appendix,

[1] The Federal Reserve Banks are not required to cash government checks presented by private individuals (31 C.F.R. § 202.25(b)).

*infra,* pp. 13–14). Should the Treasurer's first examination, conducted at the Treasurer's office in Washington,[2] reveal a government check to be forged or altered, the Reserve Bank is promptly notified and it must recredit the face amount of the check to the Treasurer's account (31 C.F.R. § 202.25(e)(1)(ii)). If a forgery or alteration is not discovered on first examination, then the check is deemed paid and no recredit is required (31 C.F.R. § 202.25(e)(1) (iii) and (iv)).

(b) *The Federal Reserve Bank Procedures.* The conditions under which Federal Reserve Banks accept checks—including government checks—for collection from private banks are governed by Federal Reserve Board Regulation J (12 C.F.R. § 210 (Jan., 1963, ed.)). At the time of the relevant events in this case, Regulation J provided, *inter alia,* that (12 C.F.R. § 210.5(a) (Jan., 1963, ed.)):

> A Federal Reserve bank will act only as agent of the bank from which it receives such checks and will assume no liability except for its own negligence and its guaranty of prior endorsements.

Regulation J further explicitly provided that all checks for which payment was not actually and finally collected by the Reserve Bank would be charged back to the forwarding bank without recourse against accounts or funds held by the Reserve Bank (12 C.F.R. § 210.5(i) (Jan., 1963, ed.)).

In addition, Circular 90 of the Federal Reserve Bank of San Francisco (Pet. 3) expressly notified

[2] 31 C.F.R. § 202.25(c).

the banks in its clearing district (including petitioner) that, by forwarding checks to it for collection, they would be understood to agree to the terms and conditions of Federal Reserve Board Regulation J and Treasury Department Circular No. 176. Circular 90 noted particularly that: "Credit for government checks will be given in accordance with this bank's time schedules and *will be subject in all cases to examination and payment by or on behalf of the Treasurer of the United States*" [emphasis supplied].

2. *The Treasurer's examination procedures.* Because of the tremendous number of government checks presented for payment each year (450,000,000 were presented in 1961) the Treasurer's "first examination" is of necessity carried out with assistance from electronic equipment. Much of the relevant information—including the amount of the check—is ordinarily punched into each government check before issue and compared with the master tapes in the Treasury when the check is presented for payment.

However, certain small government disbursing offices, usually associated with small military units, are not equipped to "punch" as well as print the amount on each check as it is issued. Such checks—issued by a small Marine Corps disbursing office in Garden City, Long Island, New York—are involved in this case. When checks without punched amounts are received by the Treasurer, they are ejected automatically from the electronic equipment for visual inspection to determine whether their amounts have been raised. These checks are also inspected at this time to see if they bear a signature, but this visual

inspection is not designed to detect forgery (Pet. App. 4). If such checks pass this inspection, they are then returned for completion of the remainder of the electronic examination process concerning data, other than amount, which is punched into these checks.

All checks are not automatically examined for forgery. Rather, when checks are reported missing without satisfactory explanation, a "stop payment" intercept is placed in the electronic equipment. When the presence of such checks is discovered in the electronic process, the equipment automatically warns of their presence and location. The checks are then intercepted and examined for forgery by the special unit of the Treasurer's office charged with this responsibility.

3. *The transactions in suit.* The checks in question in this case were negotiated to the Bank of America, and cash payment of $14,500 was made to Witten, on March 6 and 7, 1961. Petitioner forwarded the checks to the Treasurer for payment via the respondent Federal Reserve Bank of San Francisco. According to the applicable regulations, respondent gave petitioner's account conditional credit for the checks, debited the Treasurer's account accordingly, and in due course forwarded the checks for payment to the Treasurer in Washington, D.C., where they were received on March 20 and 21, 1965.

In the interim, the Treasurer was notified on March 8, 1961, that certain blank Treasury checks, including the ones in suit, were missing from a Marine Corps disbursing office (Pet. App. 5). Pur-

suant to usual procedure, the Treasurer therefore placed a "stop payment" intercept in the electronic machinery.

Because the checks involved in this lawsuit were received by the Treasurer during federal income tax refund time, there were already on hand to be examined a backlog of some six million government checks previously received for payment. Consequently, it took until March 26 and 27 for the equipment to reach the checks in suit. At this point those checks, which were of the type without punched amounts issued by small disbursing offices, were ejected for inspection to see whether their amounts had been raised and whether they bore signatures, as described above. That inspection was made on Monday, the 27th of March. After it was determined that the face amounts of the checks had not been raised and that they did bear signatures, the checks were reintroduced into the system for the completion of the electronic examination.

On March 30, 1961, the checks in question were reached by the electronic equipment and the stop payment intercept noted. The checks were then immediately located and transmitted to the unit of the Treasurer's office concerned with forgeries. On visual inspection, that unit determined that the disbursing officer's signature on each check was a forgery. Respondent was notified on the same day by telegram that the Treasurer was refusing payment on this ground. Respondent in turn notified petitioner the next day, debiting petitioner's account accordingly (Pet. App. 5).

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4. *The proceedings below.* On August 16, 1962, petitioner instituted this suit against the Reserve Bank to recover the $14,500.00 which it had paid out in exchange for the forged instruments. Petitioner alleged neither negligence nor lack of due diligence on the part of respondent Reserve Bank in handling the checks in suit. The sole ground of recovery urged was that the Treasurer's discovery of the forgeries and resultant refusal to pay the checks had been untimely.

On June 19, 1964, the district court rendered a decision in favor of respondent (Pet. App. 7), ruling that controlling Treasury regulations allow the Treasurer a reasonable time to complete "first examination" of government checks and that the Treasurer had completed his first examination and dishonored the checks here within a reasonable time. The court of appeals affirmed (Pet. App. 1).

## ARGUMENT

1. The regulations of the Secretary of the Treasury governing "Payment of Checks Drawn on the Treasurer of the United States" authorize the Treasurer to refuse payment of any government check if he discovers "on first examination" that it bears the forged signature of the drawer. The Secretary's regulations do not set an arbitrary limit within which the Treasurer must complete "first examination" of the more than one million checks received daily (31 C.F.R. § 202.25 (c), (d), and (e)(1)). Unless "plainly and palpably inconsistent with law," the Secretary's regulations in this matter concerning the operations of his de-

partment are controlling. *Boske* v. *Comingore*, 177 U.S. 459, 470.

Petitioner contends, however, that the Treasurer has only until midnight of the next business day following receipt of a check to refuse payment of government checks on grounds of forgery. Petitioner cites neither statutory nor case authority for this arbitrary limitation, but relies entirely on its own reading of respondent's regulations as establishing such a requirement. Petitioner urges that, because the Secretary's regulations do not fix an absolute, finite limit upon the Treasurer's time to complete the "first examination" of checks presented for payment, this is a "matter not covered" by Treasury Department Circular No. 176 within the meaning of Circular 90 of respondent (Pet. 3).[1] Therefore, petitioner reasons, under the provisions of Circular 90 this time limit is controlled by Federal Reserve Board Regulation J, which, petitioner asserts, in turn fixes the Treasurer's time in which to dishonor forged

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[1] Circular 90 provides, in pertinent part:

> United States Government checks will be handled in accordance with, and subject to the provisions of Treasury Department Circular No. 176 [31 C.F.R. § 202.35] in effect at the time such items are received by this bank and with respect to matters not covered by such circular, the provisions of [Federal Reserve Board] Regulation J [12 C.F.R. § 210] and this circular and time schedules shall be deemed applicable to all Government checks. * * *.

checks at midnight of the next succeeding business day.[4]

The court of appeals rejected petitioner's interpretation of the regulations, accepting instead the construction offered by the government, that "[w]hile Circular 176 contains no express provision as to the time in which the Treasurer must reject a tendered check, it does provide, in effect, that he may reject a forged check 'upon first examination.' * * * Because of this implicit provision in Circular 176 for a reasonable time within which to make such an examination, the quoted provision of Circular 90 with regard to matters not covered by Circular 176 is inapplicable" (349 F. 2d at 566). In the absence of any statute or case authority to the contrary, the court below did not err in thus deferring to the Treasury's reasonable interpretation of its own, long-standing regulation. *Udall* v. *Tallman*, 380 U.S. 1, 16–17.[5]

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[4] Regulation J provides, in pertinent part [12 C.F.R. § 210.5(d), App. *infra*, pp. 16–17):

> Any check which a Federal Reserve bank or an agent thereof presents to the *drawee bank* for payment or sends to the drawee bank for collection, and for which remittance or settlement is made by the drawee bank on the day on which it receives such check, may be returned for credit or refund at any time prior to midnight of the drawee's next business day following such day of receipt or prior to the time provided by applicable clearing house rule or special collection agreement, whichever is earlier, except that this paragraph shall not apply to checks presented over the counter. [Emphasis added.]

[5] The regulations governing the Treasurer's right to "first examination" of government checks have been in effect in substantially their present form for twenty years. See 11 F.R. 102, 106, as amended, 14 F.R. 7377 (December 9, 1949). While the court of appeals did not find it necessary to reach

2. Petitioner does not challenge the trial court's finding that the Treasurer conducted his examination of the checks in suit with reasonable dispatch (Pet. App. 3, n. 1). Rather, petitioner's alternative contention is apparently that, even if the Treasurer may dishonor a check upon "first examination," the Treasurer may not conduct his "first examination" in successive stages, first for raised amounts and then for forgery. In petitioner's view the initial inspection of a check by any member of the Treasurer's staff automatically constitutes the "first examination." Since the checks in suit were not dishonored after their initial inspection—which was only for raised amount and signature, not forgery—petitioner asserts that the checks were "paid" because not rejected on "first examination."

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them, other considerations also make it clear that Regulation J is inapplicable, and cannot, in any event, be used as a basis for imposing liability on the respondent Federal Reserve Bank. First, the section of that regulation relied upon by petitioner does not even purport to refer to checks presented to the Treasurer, but deals only with checks presented to "drawee banks." Secondly, even were the Treasurer included within that term, other provisions of Regulation J preclude any action by the forwarding bank against a Federal Reserve Bank where the "drawee bank" fails to pay a check which is cleared through respondent (12 C.F.R. § 210.5(i) (Jan., 1963, ed.)). Moreover, under Regulation J, by invoking respondent's services as a check clearing agency, petitioner agreed that respondent, as a Federal Reserve Bank, would assume no liability except for its own negligence (12 C.F.R. § 210.5(a) (Jan., 1963, ed.)). *Early* v. *Federal Reserve Bank*, 281 U.S. 84; *Converse Rubber Co.* v. *Boston-Continental Nat'l Bank*, 12 F. Supp. 887 (D. Mass.), affirmed, 87 F. 2d 8 (C.A. 1). Petitioner neither proved nor alleged any negligence on the part of the respondent in this case.

Petitioner's reading of the term "first examination" would thus compel the Treasurer to forego either visual or electronic inspection of checks, without punched amounts, like those involved in this case. Since such checks cannot be adequately inspected solely through use of electronic equipment, petitioner's reading would compel the Treasurer to perform their inspection entirely by visual, non-electronic means. Such an unrealistic construction of the applicable regulation obviously defeats the purpose of permitting the government to examine checks before payment and was properly rejected by both courts below.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1966.

## APPENDIX

The relevant provisions of Treasury Department Circular No. 176, 31 C.F.R. § 202.25, provide:

> (a) Federal Reserve Banks will make arrangements to cash Government checks drawn on the Treasurer of the United States for disbursing officers of the Department of the Army, Navy Department, and Treasury Department, and other Government disbursing officers, when such checks are drawn by the disbursing officers to their own order: *Provided,* That satisfactory identification of the officers shall be furnished. The Treasurer will, upon special request, advise Federal Reserve Banks as to whether the balances to the credit of disbursing officers are sufficient for payment of the checks presented.
>
> (b) Federal Reserve Banks will not be expected to cash Government checks presented direct to the bank by the general public.
>
> (c) Each Federal Reserve Bank will receive Government checks drawn on the Treasurer of the United States from its member banks, nonmember clearing banks, or other depositors, when indorsed by such banks or other depositors who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor, and will give immediate credit therefor and charge the amount of the checks cashed or received in the account of the Treasurer, subject to examination and payment by the Treasurer of checks payable in Washington, D.C., or by the designated Federal Reserve Bank of checks payable through a Federal Reserve Bank.
>
> (d) The Treasurer of the United States reserves the right to examine, and to refuse pay-

ment of, all Government checks handled by Federal Reserve Banks in accordance with this section: *Provided, however,* That Government checks cashed by Federal Reserve Banks in accordance with the first paragraph of this section, after having ascertained from the Treasurer that the balances to the credit of the signing officers are sufficient, will not be refused payment except for alteration or forged signature of drawer.

(e) Government checks cashed or otherwise received by Federal Reserve Banks will be handled as follows:

(1) Checks drawn on the Treasurer of the United States, other than checks payable through designated Federal Reserve Banks, will be handled as follows:

(i) The Federal Reserve Bank will forward all checks charged in his account to the Treasurer of the United States at Washington, D.C., for payment.

(ii) The Treasurer will return to the forwarding Federal Reserve Bank any check payment of which is refused upon first examination. Such Federal Reserve Bank will be expected to give immediate credit therefor in the Treasurer's account, thereby reversing the previous charge in his account for such check; but, if the check is required for use in connection with a criminal investigation or legal proceeding, the check will be retained by the Treasurer for that purpose, and a photographic copy of the face and back will be forwarded to the Federal Reserve Bank.

(iii) In the event that any check which has been paid by the Treasurer is subsequently found to bear a forged indorsement, or to bear any other material defect or alteration which was not discovered upon first examination by the Treasurer, the amount of the check will be charged in the transit account of the Federal Reserve Bank from which received and a

photographic copy thereof will be sent by the Treasurer to the bank or depositor which forwarded the check to the Federal Reserve Bank, with request that the amount thereof be paid to the Federal Reserve Bank for credit in the account of the Treasurer of the United States. If such payment is not made, the Treasurer will take such steps against such forwarding bank, or other depositor, and prior indorsers as he may deem necessary or advisable to protect the interests of the United States. Unless such payment is made, the Federal Reserve Bank will not give credit in the Treasurer's account for the amount of such check. If the check was cashed by a Federal Reserve Bank or the Treasurer is unable to determine the forwarding bank or depositor, a photographic copy of the check will be sent directly to the Federal Reserve Bank with request that an attempt be made to obtain refund. If refund is not made, the Treasurer will take such steps as he may deem necessary or advisable to protect the interests of the United States.

(iv) In cases of checks raised or bearing a forged signature of the drawer, not discovered upon first examination by the Treasurer, and in other cases where the Treasurer's right to reclaim is in question, the checks will be forwarded to the Federal Reserve Bank as collection items with no charge in the account of the Federal Reserve Bank and credit will be given in the Treasurer's account only when payments are made by the indorsers of the checks. A photographic copy may be returned in lieu of the check if the latter is required for use in connection with a criminal investigation or legal proceeding.

The relevant sections of Federal Reserve Board Regulation J, 12 C.F.R. § 210 (Jan., 1963, ed.), provide:

§ 210.5. *Terms of Collection.*

The Board of Governors of the Federal Reserve System hereby authorizes the Federal Reserve banks to handle such checks subject to the following terms and conditions; and each member and nonmember clearing bank which sends checks to any Federal Reserve bank for deposit or collection shall by such action be deemed to authorize the Federal Reserve banks to handle such checks subject to the following terms and conditions; to warrant its own authority to give the Federal Reserve banks such authority; to agree to indemnify any Federal Reserve bank for any loss or expense sustained (including but not limited to attorneys' fees and expenses of litigation) resulting from the failure of such sending bank to have such authority, or resulting from such Federal Reserve bank's guaranty of prior endorsements, or resulting from any action taken by the Federal Reserve bank within the scope of its authority for the purpose of collecting such checks; and to guarantee all prior endorsements on such checks whether or not a specific guaranty is incorporated in an endorsement of the sending bank.

(a). A Federal Reserve bank will act only as agent of the bank from which it receives such checks and will assume no liability except for its own negligence and its guaranty of prior endorsements.

* * * * *

(d). Any check which a Federal Reserve bank or an agent thereof presents to the drawee bank for payment or sends to the drawee bank for collection, and for which remittance or settlement is made by the drawee bank on the day on which it receives such check, may be returned for credit or refund at any time prior to midnight of the drawee's

next business day following such day of receipt or prior to the time provided by applicable clearing house rule or special collection agreement, whichever is earlier, except that this paragraph shall not apply to checks presented over the counter.

* * * * *

(i). The amount of any check for which payment in actually and finally collected funds is not received shall be charged back to the forwarding bank, regardless of whether or not the check itself can be returned. In such event, neither the owner or holder of any such check, nor the bank which sent such check to the Federal Reserve bank for collection shall have any right of recourse upon, interest in, or right of payment from, any reserve balance, clearing account, deposit account, or other funds of the drawee bank or of any bank to which such checks have been sent for collection, in the possession of the Federal Reserve bank. No draft, authorization to charge, or other order, upon any reserve balance, clearing account, deposit account, or other funds or a paying, remitting, or collecting bank in the possession of a Federal Reserve bank, issued for the purpose of settling items handled under the terms of this part will be paid, acted upon, or honored after receipt by such Federal Reserve bank of notice of suspension or closing of such paying, remitting or collecting bank.

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